Supreme Court, U.S.
FILED

94- 37 JUL - 5 1994

No._____ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

NATALIE GREENFIELD,

Petitioner,

v.

CITY OF MIAMI BEACH, a
municipal corporation,
et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

G. Ware Cornell, Jr.
Counsel of Record
G. Ware Cornell, Jr., P. A.
P.O. Box 14633
Ft. Laud., FL 33302
(305) 524-2703
Attorney for Petitioner Natalie Greenfield

45 pp

STATEMENT OF ISSUES PRESENTED

Does a public employee protesting anti-Semitic conditions in the work place forfeit her otherwise Constitutional right of freedom of speech because she is herself Jewish and stands to personally gain by airing her grievance?

In a case where protected speech is coupled with speech on private, personal concerns, may a court disregard the protected speech where it determines the non-protected speech was more substantial than the protected speech and thereby render summary judgment against a First Amendment plaintiff?

TABLE OF CONTENTS

Statement of Jurisdiction 1

Constitutional Provision 1

Statement of the Case 2-6

Argument 6-15

Conclusion 15

Appendix 16

A. Decision of the Court of Appeals 1A-2A

B. Order Granting Defendants' Motion for Partial Summary Judgment and Denying as Moot Defendants' Motion for Clarification and Request for Attorneys Fees 3A-20A

C. Order Denying Plaintiff's Motion for Rehearing, New Trial and/or Amended Judgment 21A-24A

TABLE OF AUTHORITIES

Page

Cases

Rankin v. McPherson, 483 U.S. 378 (1987) 8, 9, 12

Connick v. Meyers, 461 U.S. 138, 152 (1983) . 8, 12, 13, 14, 15

Pickering v. Board of Education, 391 U.S. 563 (1968) . . .9, 11

Rode v. Dellarciprete, 845 F.2d at 1202
(3rd Cir. 1988) 9, 10

Conaway v. Smith, 853 F.2d 789, 796
(10th Cir. 1988) 10

Callaway v. Hafeman, 832 F.2d 414, 417
(7th Cir. 1987) 10

Dodds v. Childers, 933 F.2d 271, 273
(5th Cir. 1991) 11

Hesse v. Board of Education, 848 F.2d 748, 751
(7th Cir. 1988) 11

Johnsen v. Independent School Dist. No. 3
of Tulsa County, 891 F.2d 1485
(10th Cir. 1989) 12, 13

Fiorillo v. United States Department of Justice
Bureau of Prisons, 795 F.2d 1544,
1550 (Fed. Cir. 1986) 13

Ezekwo v. New York City Health & Hospitals Corp.
940 F.2d 775, 781 (2nd Cir. 1991) 14

Davis v. West Community Hospital,
755 F.2d 455, 462 (5th Cir. 1985 14

McMurphy v. City of Flushing,
802 F.2d 191, 195 (6th Cir. 1986) 14

Greenberg v. Kmetko, 11 F.2d 1057, 1062
(7th Cir. 1987) 14

Solomon v. Royal Oak Township, 842 F.2d 862, 856
(6th Cir. 1988) 14

Monsanto v. Quinn, 674 F.2d 990, 996-97
(3rd Cir. 1982) 14

Constitutional Amendment

U.S. Const. Amend. I (1791) 1

PETITION FOR A WRIT OF CERTIORARI

Natalie Greenfield respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS OF OTHER COURTS

The decision of the Court of Appeals (App. 1A) is unreported. The judgment of the District Court (App. 2A) is not reported nor is the order denying Plaintiff's motion for rehearing (App. 19A) reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1994 (App. 1A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution provides:

> Congress shall make no law respect an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I (1791)

STATEMENT OF THE CASE

A. Greenfield's Speech

This case arises out of a termination of public employment by the City of Miami Beach ("the City"). Natalie Greenfield worked as a receptionist for the Bass Museum, a governmental agency. The termination followed the City's discovery that Greenfield, had a series of conversations with Susan Miller, a museum benefactor, in which Greenfield pointed out wasteful practices that she observed at the museum. The wasteful practices included a misallocation of physical and human resources. At other times, Greenfield complained to Miller about an undercurrent of anti-Semitism among the museum's directors. Greenfield also complained that her own talents were not put to best use and that the museum should allow her to do fund raising. These conversations were in all instances initiated by Greenfield and spanned several months.

Greenfield's supervisor was alerted to these conversations by Susan Miller and asked Miller to place these facts in writing. Miller complied with a letter dated January 3, 1991. The supervisor then used the letter as a basis for suspending Greenfield and ultimately terminating her from her job.

B. The Summary Judgment.

Greenfield filed suit in district court against the City under 28 U.S.C. §1983 alleging that her communication with Sue Miller was protected speech under the First Amendment.[1] The City filed a Motion for Partial Summary Judgment on the First Amendment issue, arguing that Greenfield's speech was directed to purely private concerns and was not protected by the First Amendment. Greenfield furnished counter-affidavits and other evidentiary material showing that her motivation in seeking to eliminate waste was not personal and that she genuinely cared about departmental efficiency. Greenfield also pointed out that although she was herself Jewish, some of the anti-Semitic comments were not directed at her and were thus not personally motivated. Greenfield conceded that her requests to perform fund raising tasks were purely personal.

The Court found that Greenfield had held several conversations with Sue Miller and one conversation with another benefactor. It found that Greenfield complained about efficiency and waste in her department and that she petitioned

---

[1]The complaint included claims asserted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e as well as 28 U.S.C. §1983, thus invoking federal question jurisdiction.

them for a better position. The Court concluded that Greenfield's statements could not be fairly characterized as addressing matters of public concern and entered an order granting the City's Motion for Partial Summary Judgment.

Curiously, the order did not reference any of the speech related to anti-Semitism and Plaintiff moved for rehearing to address this point. The Court thereafter entered an order denying Plaintiff's Motion for Rehearing in which it acknowledged that anti-Semitism is a matter of public importance but held that Greenfield's complaints would not be afforded First Amendment protection since Greenfield's speech focused on intra-office problems and was, therefore, "primarily" directed at personal, rather than public, concerns.

C. Greenfield's Appeal to the Eleventh Circuit.

Greenfield listed two points of error on appeal. On the issue of free speech, she asserted that the trial court failed to separate out and independently consider elements of private, personal concern from other elements of speech touching upon issues of public importance. Plaintiff conceded that certain aspects of particular communications were primarily of personal concern. However, the speech contained both private and public components delivered over a period of months that the court was bound to consider separately. By lumping those

components together and ruling that the speech was "primarily a personal" communication, the court ignored established precedent of this Court.

Greenfield also argued that the speech issue, which arose in the context of a motion for summary judgment under Rule 56, was governed by the same burden of proof allocation as in any other civil case. The fact that the nature of a communication as "public" or "private" is a pure matter of law did not compel the district court to make a summary judgment ruling where there was disputed testimony concerning the Plaintiff's motivation.

Greenfield also attacked the district court's judgment for focusing on Greenfield's ulterior motives in complaining to Susan Miller. The fact that a declarant has some personal reason for making her complaint does not automatically transform a matter of public concern to a matter of private concern. As support, Greenfield cited decisions where this Court found Constitutionally protected speech notwithstanding that the declarant had some personal motivation and stood to profit from his speech.

The City of Miami Beach defended its judgment, pointing out that Greenfield's speech was self-serving and motivated by a desire to improve her working conditions. The City downplayed the importance of anti-Semitism in the

workplace by placing Greenfield's comments within the context of her personal dissatisfaction with her employment conditions. Finally, the City pointed out that Plaintiff had made no attempt to inform the general public of her complaints. In an opinion filed April 6, 1994, following oral argument, the Court of Appeals affirmed per curium the district court's decision on the Motion for Partial Summary Judgment and Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' failure to reverse the district court's grant of partial summary judgment warrants this Court's attention because of serious inroads that it foretells to First Amendment protection. The court, sub silentio, paid homage to the rule that a declarant's personal stake in the matter about which she speaks tarnishes the otherwise protected character of her speech and converts it to a matter of private concern, notwithstanding that it may embrace a matter of public importance. The consequences are that a public employer may direct offensive conduct at or about a particular employee and then retaliate against him for speaking out against it, without offending the First Amendment. Under such a rule, the subject matter of the speech becomes subverted to the declarant's motive; any real or potential benefit to the declarant disqualifies

him from asserting his Constitutional privilege. This ruling so far departs from the accepted and usual practice followed as to call for an exercise of this Court's power of supervision.

A second reason for granting the writ transcends the facts of this case and seeks clarification whether this Court's reference to speech "fairly characterized as constituting speech on a matter of public concern," in Connick v. McPherson is consonant with the prevailing notion that the proper inquiry is whether the speech is "primarily" of public or private concern.

1. The Court of Appeals Refused to Consider the Public Importance of a Given Communication in Light of the Declarant's Motive

It is a fundamental tenet of Constitutional law that neither a State nor its agencies may infringe upon speech concerning a matter of public importance. Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Meyers, 461 U.S. 138, 152 (1983). No decision of this Court has ever suggested that the declarant's ulterior motive is the guiding light in determining the character of the speech, such that speech may be "of public importance" when spoken by one declarant but "not of public importance" when spoken by another. Logic dictates that any complainant has some personal reason for complaining, whether it is to enhance one's image, embarrass another or register one's displeasure. The district court's observation that Greenfield experienced "personal unhappiness in her job," is self-evident but is not the test for measuring Constitutional protection. Persons who are content do not complain. These facts should not detract from the pivotal consideration whether a communication addresses a matter of public concern.

There is little doubt that Greenfield, as a Jewess, would have profited indirectly from quelling anti-Semitic remarks in the office. The implications of the Court's ruling is disastrous; as

long as a public employee can be found to have some personal stake in the outcome of otherwise protected speech, a state official is free to punish the exercise of such speech and deprive him of Constitutionally protected rights, including his interest in continued employment.

This interpretation offends the salutary purpose behind the First Amendment and is discredited by numerous exemplary decisions of this Court. In Rankin v. McPherson, supra, a public employee's favorable comment upon an assassination attempt against President Reagan was considered "a matter of public concern," notwithstanding that the declarant was black and felt that the president's policies were disadvantageous to blacks. In Pickering v. Board of Education, 391 U.S. 563 (1968), this Court held that a public school teacher who was interested in better teachers' salaries and a greater emphasis on scholastics could publicly protest a school board's allocation of resources between athletics and academics while preserving First Amendment protection.

Ironically, the Court of Appeals ignored several exemplary decisions from its own circuit which afforded Constitutional protection to public employees who spoke out on matters directly affecting their job duties. See also, Rode v. Dellarciprete, 845 F.2d at 1202 (3rd Cir. 1988) ("Dismissing [

] speech as unprotected merely because she had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected employee from speaking out"). Rode is among the majority of courts which hold that a declarant's motivation is merely one factor to be considered but is not controlling. Id., at 1201. But see, Conaway v. Smith, 853 F.2d 789, 796 (10th Cir. 1988) where the Court held: "Courts have focused on the motive of the speaker in analyzing whether the speech qualifies as a matter of public concern...." This also appears to be the rule in the Seventh Circuit. Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987). There is a split of authority how much weight to accord a declarant's underlying motive. These decisions cannot be reconciled with clear Supreme Court doctrine. In sum, even if it could be gainsaid that Greenfield would have profited by the elimination of opprobrious remarks in the office prompted by a desire to enhance her working conditions, a court cannot deprive her of Constitutional rights. Any contrary interpretation would impose an unnecessary and unreasonable burden on public and private employees alike.

2. Consideration of Public and Private Elements of a Given Speech

In cases where the state discharges an employee because

of speech, a four-stage analysis has evolved. At the first stage, the court determines the threshold issue raised in Pickering v. Board of Education, 391 U.S. 563 (1968), whether the employees speech is protected under the First Amendment. If the speech addresses a matter of public concern, the court then applies the second prong of Pickering, the balancing test, weighing the employee's First Amendment interests against "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. Ever since Connick v. Myers established the threshold inquiry whether given a speech may be "fairly characterized as constituting speech on a matter of public concern," several circuits, including the Eleventh, have loosely interpreted this language as allowing a test whether the speech is "primarily" public or private. See, e.g., Dodds v. Childers, 933 F.2d 271, 273 (5th Cir. 1991); Hesse v. Board of Education, 848 F.2d 748, 751 (7th Cir. 1988). The decision under review applies this test in a radically different manner. Rather than considering the character of a given speech, the Court averages in all of Greenfield's conversations on each of the three topics described and concludes that the speech was "primarily" private. This interpretation was clearly not intended by the formulated test and flies in the face of Connick.

Connick's reference to "a given statement," shows the Court's predilection to treat each speech separately. Both Connick v. Myers and Rankin v. McPherson, 483 U.S. 378 (1987) involved speech in which some elements related to matters fairly characterized as issues of public importance and others did not. In each case, the First Amendment speech was separated out and given singular treatment. Connick recognized that a speech may have both protected and non-protected components. The case concerned an assistant district attorney who was terminated after distributing a questionnaire among her peers. The Supreme Court concluded that most of the questions reflected the employee's dissatisfaction with the job transfer and was a purely private matter. However, one question out of the fourteen addressed itself to whether attorneys ever felt pressured to work in political campaigns. Because of that one question, the Court proceeded to the second part of the threshold inquiry.

The rule as it has evolved in the circuit courts is best described in Johnsen v. Independent School Dist. No. 3 of Tulsa County, 891 F.2d 1485 (10th Cir. 1989). There, the court summarized the prevailing caselaw and ruled that multiple instances of speech, each dealing with separate subjects, should be treated individually not only in the threshold determination

but also in applying the Pickering balancing test. Although the rule summarized in Johnsen has been given lip service by the caselaw, the Circuit Courts have not apply the rule uniformly.

In this case, the Court failed to recognize the hybrid character of Greenfield's speech or to appreciate that her conversations, spanning several months and several topics of conversation, did not all have to be treated together. The speech clearly contains both private and public components that the Court was bound to consider separately. By lumping together these components and ruling that the speech was "primarily" a personal communication, the Court embarked upon a dangerous precedent that seriously erodes First Amendment protection.

Because of the paramount importance of the First Amendment, doubts are supposed to be resolved in favor of protection. Even a document that "touch[es] upon matters of public concern in only a most limited sense" should be considered protected speech. Connick v. Meyers, 461 U.S. at 154. Although neither the District Court nor the Court of Appeals admitted it, the Court has placed itself in direct conflict with the approach of this Court. In actual practice, however, the Circuit Courts have taken widely divergent paths. See, e.g., Fiorillo v. United States Department of Justice, Bureau of

Prisons, 795 F.2d 1544, 1550 (Fed. Cir. 1986)("Petitioner's press conferences as a whole reflected personal concerns."); Ezekwo v. New York City Health & Hospitals Corp., 940 F.2d 775, 781 (2nd Cir. 1991)("viewed . . . as a whole, Ezekwo's statements did not address matters of public concern); Davis v. West Community Hospital, 755 F.2d 455, 462 (5th Cir. 1985)(. . . "No particular statement touching upon a matter of potential public concern must be treated separately out of context and thereby given First Amendment protection"). Ironically, the Fiorillo court relied on language in Connick for its authority that prohibited the petitioner from attempting to parse the transmitted information.[2] In so doing, it has undermined the salutary purpose of the judicially-devised distinction between public and private speech. Part of the confusion may be engendered by the predilection of some courts to merge the threshold Connick issue with the second-stage Pickering balance. See, e.g., McMurphy v. City of Flushing, 802 F.2d 191, 195 (6th Cir. 1986).

This Court should confirm that the First Amendment

---

[2]Not all such decisions have found for the public employer. Cf., Greenberg v. Kmetko, 11 F.2d 1057, 1062 (7th Cir. 1987); Solomon v. Royal Oak Township, 842 F.2d 862, 865 (6th Cir. 1988); Monsanto v. Quinn, 674 F.2d 990, 996-97 (3rd Cir. 1982).

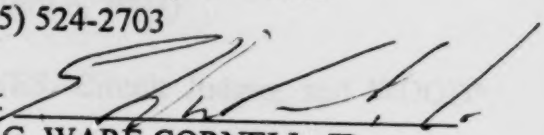
precludes a state from retaliating against a citizen employed by it for self-expression on a matter of public importance, even though mixed with elements of private concern and supplemented by other speech of purely private concern. It is equally important that litigants not be foreclosed from presenting evidence of public spiritedness to a jury simply because he stood to profit from airing his feelings. Here, the Court of Appeals has done what this Court prohibited in Connick. The decision holds complainants to an impossible standard that will chill the rights of public employees to express themselves on any matter related to the agency that employs them.

Conclusion

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

G. WARE CORNELL, JR., P. A.
P. O. Box 14633
Fort Lauderdale, FL 33302
(305) 524-2703

BY: 
G. WARE CORNELL, JR.

Attorneys for Petitioner

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Re: Natalie Greenfield, Petitioner v. City of Miami Beach, et al.

IN THE UNITED STATES COURT OF APPEAL

FOR THE ELEVENTH CIRCUIT

No. 93-4158

D.C. Docket No. 91-2728-CIV-HIGHSMITH

NATALIE GREENFIELD,

Plaintiff-Appellant,

versus

CITY OF MIAMI BEACH, FLORIDA,
a municipal corporation; DIANE W. CAMBER,
CARLA TALARICO and ERNIE BARHAM,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 6, 1994)

Before COX and CARNES, Circuit Judges, and WOOD*. Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

"Costs taxed against plaintiff-appellant."

*Honorable Harlington, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Judgment Entered: April 6, 1994
For the Court: Miguel J. Cortez, Clerk

By: /S/
Deputy Clerk

ISSUED AS MANDATE: **April 29, 1994**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-2728-CIV-HIGHSMITH

NATALIE GREENFIELD,

Plaintiff,

v.

CITY OF MIAMI BEACH, a
municipal corporation,
et al.,

Defendants.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING AS MOOT DEFENDANTS' MOTION FOR CLARIFICATION AND REQUEST FOR ATTORNEY'S FEES

THIS CAUSE comes before the Court upon Defendants City of Miami Beach, Diane W. Camber, Ernie Barham and Carla Talarico's Motion for Partial Summary Judgment as to Counts I, III, IV and V of the complaint, filed May 26, 1992.

INTRODUCTION

Plaintiff NATALIE GREENFIELD filed a five-count Amended Complaint against Defendants CITY OF MIAMI

BEACH ("Miami Beach") and three city employees, DIANE W. CAMBER, the executive director of the Bass Museum of Art, ERNIE BARHAM, the personnel director of Miami Beach and CARLA TALARICO, the acting City Manager of Miami Beach. Greenfield asserts that: (1) the defendants abridged her first amendment rights to freedom of speech and free exercise of religion, in violation of 42 U.S.C. § 1983; (2) that Miami Beach engaged in religious discrimination, in violation of Title VII of the Civil Rights Act of 1964, Florida's Human Rights Act of 1977, and 42 U.S.C. § 1983; and (3) that Miami Beach fired her in retaliation for her decision to file a charge of discrimination with the Equal Employment Opportunity Commission, in violation of Title VII. The EEOC retaliatory firing allegation is not challenged in the Defendants' Motion for Partial Summary Judgment and will not be addressed by the Court.

STANDARD OF REVIEW

In deciding a summary judgment motion, a court must apply the standard in Fed.R.Civ.P. 56 (c):

> The standard sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In applying this standard the Eleventh Circuit has stated that:

> The party seeking the summary judgment bears the exacting burden of demonstrating that there is no genuine dispute as to any material fact in the case. In assessing whether the movant has met this burden, the courts should view the evidence and all favorable inferences therefrom in the light most favorable to the party opposing the motion. All reasonable doubts about the facts should be resolved in favor of the non-movant.

Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982) (citations omitted). Moreover, "the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The United Sates Supreme Court has provided significant additional guidance as to the evidentiary standard which trial courts should apply in ruling on a motion for summary judgment:

> [The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the

> governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U.S. 476, 479-80 (1943).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Court in Anderson further stated that "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Id. at 252. The evidence presented cannot consist of conclusory allegations, legal conclusions or evidence which would be admissible at trial. Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991). "If the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-251.

UNDISPUTED FACTS

On May 14, 1990, Greenfield became an employee of Miami Beach as a clerk\typist for the Bass Museum of Art ("Bass Museum"}. she immediately notified her supervisors that she was a practicing Orthodox Jew, and requested accommodation of her working hours and daily schedule for the Jewish Sabbath and High Holidays. (Amended Complaint, D.E. #10, at ¶ 10). Melissa Cloud, Greenfield's supervisor, assured her that she would not need to work on any Jewish holidays, and that "flex-time" work rules available to department

employees would provide her with an opportunity to make up lost hours. (Joint Pretrial Stipulation, D.E. #24, at 3). A short time before the 1990 Jewish high holy days of Yom Kippur and Rosh Hashannah, however, Greenfield's supervisor advised her that she was no longer eligible for "flex-time" because she had abused the privilege. Greenfield admits that she came into work early without prior approval, even though she had been warned that this behavior was unacceptable. Id. These self-adjustments to her schedule resulted in weeks where she worked less than the required hours without loss of pay, followed by weeks where she worked in excess of forty hours so that she could accumulate overtime payments. Id. She was also advised that she was only eligible for religious holiday pay to the extent of her accumulated leave time, including three sick-leave days. These changes placed Greenfield on the same footing as all Miami Beach employees. (Affidavit of Joseph R. Pinon, D.E. #18, at ¶ 8).

In December 1990, Greenfield held several conversations with Sue Miller, the president of Friends of the Bass Museum. On May 24, 1991, Greenfield held a single conversation with Joyce Kaiser, the incoming president of the Friends of the Bass Museum. Greenfield's conversations with Miller and Kaiser were prefaced with complaints about efficiency and waste in the

development office of the Bass Museum. She proceeded, however, to complain about her personal job evaluations and to assert her qualifications for better positions.\

Greenfield was also assigned additional work prior to the Jewish high holy day of Yom Kippur, after she requested that she be able to leave work at 1:00 p.m. (D.E. #17, at 278). Greenfield stayed until 3:00 p.m. to finish the work, even though she was not expressly asked to finish the work that afternoon, and she was able to leave work in time to celebrate the holiday without breaking any Jewish laws. Id. In addition, Greenfield was reprimanded for engaging in a telephone conversation with her rabbi about a religious problem that arose in the office. (D.E. #18, at p. 7-8). Greenfield never explained to her supervisors why she called her Rabbi and became hysterical during the telephone call while sitting at the front desk of the development office. Id.

In Fall, 1990, Greenfield received an employee evaluation report rating her as "satisfactory," but she received low scores in the categories of employee relations and quality of work. (Exhibit I, D.E. #33). Then, Greenfield filed a charge of employment discrimination with the EEOC on January 3, 1991. Immediately after filing this charge, Greenfield missed several days of work. (D.E. #10, at ¶ 17). Upon Greenfield's return to

work five days later, Camber, the museum's executive director, asked Barham, the city's personnel director, to suspend Greenfield. On March 20, 1991, Greenfield received a three-day suspension for the following reasons: (1) conduct unbecoming an employee of the city; (2) display of an antagonistic attitude towards superiors and fellow employees; and (3) violation of a lawful and reasonable regulation or order or failure to follow the order of a supervisor. (Disciplinary Action Notice, D.E. #33). Greenfield field a second charge of discrimination with the EEOC on May 26, 1991. On June 28, 1991, Greenfield was terminated.

I. Freedom of Speech Claim: Count V

The state may not demote or discharge a public employee in retaliation for speech protected under the first amendment. Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11th Cir. 1989). A public employee's right of freedom of speech, however, is not absolute. Rankin v. McPherson, 483 U.S. 378 (1987). To determine whether a public employee has violated the first amendment, a court must balance the employee's interest " as a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs

through its employees." Id. at 384 (citing Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

The threshold question for the Court, therefore, is whether Greenfield's speech may be "fairly characterized as constituting speech on a matter of public concern." Connick v. Myers, 461 U.S. 138, 146 (1983); Schneider v. Indian River Community College Found., Inc., 875 F.2d 1537, 1542 (11th Cir. 1989). This inquiry requires an evaluation of the content, form, and context of Greenfield's statements, as revealed by the entire record. Connick, 461 U.S. at 147-48. "If the employee's speech cannot fairly be characterized as constituting speech on a matter of public concern, the inquiry is at an end." Ferrara v. Mills, 781 F.2d 1508, 1512 (11th Cir. 1986).

Greenfield relies on her conversations with Miller and Kaiser for her free speech claim. Specifically, Greenfield points to the initial series of conversations between Miller and Greenfield, and Miller's complaint to Camber that the phone calls were inappropriate. (D.E. #18, ¶ 17). She also points to the pivotal role played by the conversations between Greenfield and Miller in Greenfield's suspension of March 20, 1991. (Minutes of Personnel Board Meeting, D.E. #33.) Greenfield claims that her goal, in talking with Miller, was to convince Miller to intervene and make peace in the office. (Deposition of

Natalie Greenfield, D.E. #18) In addition, she asserts that she wanted to point out that she should be spending her time soliciting members, not making extra copies or doing inventory. Id.

Greenfield's statements cannot be fairly characterized as addressing matters of public concern. Greenfield does not allege serious misconduct or demonstrate that her purpose is to save taxpayers' dollars. See Martinez v. City of Opa-Locka, Case No. 90-6057 (11th Cir. September 10, 1992) (finding allegations of government corruption are matters of public concern); Williams v. Roberts, 904 F.2d 634 (11th Cir. 1990) (finding complaints about proposed spending provisions are protected speech). In fact, here profession of public concern loses whatever force it may have when it is considered that she took no affirmative steps to inform the public at large about the problems with which she claims to have been so gravely concerned. Instead, she contacted a person who had no direct authority to address these problems. See Deremo v. Watkins, 939 F.2d 908, 911 (11th Cir. 1991). A few isolated complaints made verbally in private conversations do not evince a genuine public concern for corruption in government.

Moreover, the Bass Museum managers were under no obligation to run the museum as a "roundtable for employee

complaints over internal office affairs." Connick, at 461 U.S. at 149. As the Sixth Circuit recently explained:

> [I]t is hard to see how any aspect of the operation of any department of any public body could be said not to constitute a legitimate subject of public concern. Connick instructs us to examine both the content and the context of the employee's statement, however, and the Court's opinion seems to suggest that if, having done so, we find that the employee's personal interest qua employee predominates over any interest he may have as a member of the general public, we are not to intercede.

Brown v. City of Trenton, 867 F.2d 318, 321-22 (6th Cir. 1989).

Greenfield's complaints about inequities and mismanagement, centered around her personal unhappiness in her job, were not related to matters of public concern and therefore, were not protected under the first amendment. As a result, any unfavorable job action taken against Greenfield as a result of this speech, whether a suspension or a dismissal, cannot form the basis of a claim that she was retaliated against in violation of the first amendment.

II. Religious Discrimination Claims: Counts I, III & IV

A. Title VII and Florida Human Rights Act Claims: Counts I & IV

Greenfield charges Miami Beach with religious discrimination in violation of Title VII, the Florida Human Rights Act, and 42 U.S.C. § 1983.[1] Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice:

> to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000(e)-2(a)(1) (West 1981). the United States Supreme Court has held that Title VII requires employers to make reasonable accommodations, short of undue hardship, for the religious practices of employees and prospective employees. Trans World Airlines v. Hardison, 432 U.S. 63, 74 (1977).

1. Religious Accommodation

---

[1]The Florida Human Rights Act of 1977, Fla. Stat. 760.01 (West 1989), is patterned after Title VII. O'Loughlin v. Pinchback, 579 So.2d 788, 791 (1st DCA 1991). Pursuant to Florida's long-standing rule of statutory construction that recognizes that state laws pattered after federal statutes must be interpreted as if they were one, the Florida law is accorded the same construction as Title VII. Id.; Massie v. University of Florida, 570 So.2d 963, 969 (1st DCA 1990). The Court's summary judgment consideration of Greenfield's Title VII claim will therefore be dispositive of Greenfield's claim under the Florida Human Rights Act.

Greenfield contends that Miami Beach failed to accommodate her religious beliefs by cancelling her "flex-time" privileges. She readily admits, however, that she was never asked or forced to work on a religious holiday nor has she ever actually worked on a religious holiday. (Deposition of Natalie Greenfield, D.E. #17(b)). She does not directly contend that she should be paid for time spent away from the job, but she argues that she should be allowed to "make-up" any time that she misses by working on lunch-breaks or extra hours.

Title VII requires reasonable accommodation, but does not require employers to accommodate the religious practices of an employee in exactly the way the employee would like to be accommodated. Pinsker v. Joint Dist. No. 28J of Adams and Arapahoe Counties, 735 F.2d 388 (10th Cir. 1984). Nor does Title VII requires an employer to act in a manner that spares the employee any cost. Brener v. Diagnostic Center Hospital, 671 F. 2d 141, 145-46 (5th Cir. 1982). Miami Beach adopted a policy allowing employees to take off work whenever necessary without pay for religious observances. (Affidavit of Joseph R. Pinon, D.E. #18). All city employees were only entitled to pay for religious holidays to the extent of their available leave time, including up to three days of sick leave. Id.

In addition, Miami Beach authorizes its department heads, at their discretion, to utilize "flex time" schedules. Id. Greenfield was initially allowed to use a flexible schedule as a further accommodation of her religious needs. (Joint Pre-trial Stipulation, D.E. #24). The evidence clearly shows, however, that Greenfield took advantage of this privilege by changing her schedule from day-to-day and coming into work without prior approval against the orders of her superiors. (D.E. # 17(b)). These self-adjustments to her schedule resulted in weeks where she worked less than the required hours without loss of pay, followed by weeks where she worked in excess of forty hours so that she could accumulate overtime payments. Id. In response, Miami Beach justifiably curtailed her "flex-time" schedule. Id.

The religious leave policy and the removal of Greenfield's flexible schedule option jeopardized neither Greenfield's job nor her observation of the Jewish holidays. The flex-time option was more than what was required by Miami Beach's religious holiday policy or by Title VII. In fact, Greenfield presents no evidence demonstrating that any other employees at the Bass Museum used flex-time schedules. In addition, Greenfield had the option of using her three-day sick

leave or general accumulated leave time in order to obtain paid religious leave.

Miami Beach's policy may have occasionally caused Greenfield to take an unpaid holiday, but it was not an unreasonable accommodation of Greenfield's religious beliefs and practices. "The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work." Ansonia Bd. of Education v. Philbrook, 479 U.S. 68, 70 (1986). In effect, employers are not required under Title VII to provide fully paid leave to employees for religious holidays where the employee is absent from work. Pinsker, 735 F.2d at 391. A requirement forcing an employer to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment on the basis of their religion. Hardison, 432 U.S. at 84.

2. Religious Discrimination

Greenfield also claims that the disciplinary actions taken against her were the result of religious discrimination. She admits that she cannot proffer any direct evidence showing a

discriminatory intent or motive, so she attempts to prove a Title VII disparate treatment violation through circumstantial evidence. (D.E. # 33). In order to state a claim for religious discrimination using indirect evidence, Greenfield must make out a prima-facie case. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima-facie case of discrimination, Greenfield must demonstrate that: (1) she is a member of a protected class; (2) she was qualified for and satisfactorily performed the duties of her job; (3) she was discharged; and (4) others not in the protected class were treated more favorably. Andre v. Bendix Corp., 841 F.2d 172 (7th Cir. 1987).

In this case, Greenfield demonstrated that she is a member of a protected class and was discharged, but she fails to prove that she was performing to her employer's satisfaction. The defendants have provided evidence that Greenfield did poorly on a job evaluation, repeatedly disobeyed instructions from her superiors, and made inappropriate phone calls of a personal nature to an important benefactor of the Bass Museum. (D.E. #18). Greenfield also readily admits that she chose her own hours and was often reprimanded for scheduling problems. (D.E. #17). More hearsay evidence that may not be considered by the Court when deciding a summary judgment motion.

Avirgan, 932 F.2d at 1577. There is simply no credible direct or indirect evidence suggesting that Greenfield was suspended or terminated as a result of religious discrimination.

B. The 42 U.S.C. § 1983 Claims: Count III

Greenfield also alleges that she is the victim of a retaliatory suspension and termination for engaging in the free exercise of her religious beliefs as guaranteed by 42 U.S.C. § 1983. In analyzing Greenfield's § 1983 claim, the Court must determine whether Miami Beach has placed a burden upon her rights to free exercise of religion. Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 717 (1980). In Thomas, the United States Supreme Court held that:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Id. at 717-18.

This standard was developed for situations where the "adherent" is forced to choose between violating her religious beliefs for the sake of continued employment or relinquishing employment to obey religious tenents. Greenfield, however, was never forced to choose between continued employment or

her religious tenents. The only choice she was forced to make was whether she wanted to lose pay fir those few days when she needed to attend religious services. As this Court noted earlier, loss of an occasional paycheck for time not worked does not constitute substantial pressure on an employee to violate her beliefs. See Pinsker, 735 F.2d at 391.

In Philbrook, the U.S. Supreme Court held that unpaid leave is a reasonable accommodation of religion, unless the employer forbids employees from using leave for religious purposes, but allows employees to use leave for any other purpose. Philbrook, 479 U.S. at 70. In this case, Miami Beach allows employees to use any amount of their accumulated leave or sick time for religious holidays. Therefore, Greenfield's religious free exercise rights have not been violated by the policies or actions of Miami Beach.

Conclusion

Greenfield's speech was not a matter of public concern, and Greenfield's religious requirements received adequate accommodation. Greenfield admits that she has proffered no direct evidence of religious discrimination, and she fails to

present any credible evidence of indirect discrimination. It is therefore

ORDERED AND ADJUDGED that

Defendant's City of Miami Beach, Diane W. Camber, Ernie Barham and Carla Talarico's Motion for Partial Summary Judgment as to Counts I, III, IV and V of the complaint is GRANTED. The action may proceed as to Count II of the complaint.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of November, 1992.

/S/
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-2728-CIV-Highsmith

NATALIE GREENFIELD.

Plaintiff,

vs.
CITY OF MIAMI BEACH, FLORIDA a Municipal Corporation, DIANE W. CAMBER,ERNIE BARHAM, and CARLA TALARICO,

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING, NEW TRIAL AND/OR AMENDED JUDGMENT

THIS CAUSE comes before the Court upon Plaintiff's Motion for Rehearing, New Trial and/or Amended Judgment, filed November 25, 1992.

On November 12, 1992, the Court issue an Order granting Defendant's Motion for Partial Summary Judgment. Plaintiff Natalie Greenfield ("Greenfield") contends that the Court committed two errors: (1) the Court erred in refusing to consider or characterize anti-Semitism and waste as matters of public concern; and (2) the Court erred in determining that there did not exist a genuine issue of material fact as to religious

discrimination in the workplace. The Court will address each of these claims separately:

(1) Freedom of Speech

Greenfield asserts that the Court ignored all issues of speech related to anti-Semitism and waste. Contrary to Greenfield's allegations, however, the Court did not ignore speech involving waste and anti-Semitism. The Court made a determination, primarily using Greenfield's own deposition testimony, that Greenfield's speech was focused on personal intra-office problems, not issues of public concern. It is well settled that the first prong of the free speech analysis is an issue of law for determination by the Court, not an issue for the trier of fact. Pearson v. Macon-Bibb County Hospital Authority, 952 F.2d 1274 (11th Cir. 1992), quoting Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986).

Greenfield also asserts that the Court ignored Diane Camber's cavalier response to suggestions of anti-Semitism from Mary Blackburn Posey, and that Diane Camber failed to investigate the charges of anti-Semitism made to Sue Miller by Greenfield. Greenfield fails to realize, however, that the Court's role in this free speech analysis is to evaluate the content, form and context of Greenfield's statements, not the statements or activities of other employees. Connick v. Myers, 461 U.S. 138,

147-48 (1983).

Finally, as part of her motion for rehearing, Greenfield submitted the Anti-Defamation League Survey on Anti-Semitism and Prejudice in America. The Court, however, has never disputed the obvious fact that anti-Semitism is a matter of public concern. Greenfield fails to understand that the Court does not function as a branch of the Orwellian "thought police." Whether some employees are anti-Semitic or not is irrelevant to the Court's determination of whether speech is entitled to First Amendment protection. The Court's duty is to examine the speech and determine if it constitutes speech on a matter of public concern, not to act as a political censor. In this instance, Greenfield's speech was primarily aimed toward personal gain, not public concerns.

(2) Religious Discrimination

Greenfield claims that the Court committed a second error by finding that Greenfield was not discriminated against on the basis of her religion. In furtherance of this assertion, Greenfield repeatedly contends that she was the victim of direct religious discrimination. (Motion for Rehearing, D.E. #60). Greenfield, however, conceded in an earlier filing that there is no evidence of any direct religious discrimination against her.

(Greenfield's Response to the Defendant's Motion for Summary Judgment. D.E. #33). In addition, Greenfield makes assertions that are not supported by the record. For instance, it is undisputed that Greenfield was never asked nor compelled by her employer to commit an anti-religious act, yet Greenfield now alleges that she was forced to destroy sacred scripts. (Motion for Rehearing, D.E. #60 at p. 9).

Conclusion

For these reasons, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Rehearing, New Trial and or Amended Judgment is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of December, 1992.

/S/
SHELBY HIGHSMITH
UNITED STATES
DISTRICT JUDGE

cc: all counsel of record

Supreme Court, U.S.
FILED
AUG 4 1994
OFFICE OF THE CLERK

No. 94-37

In The

Supreme Court of the United States

October Term, 1994

NATALIE GREENFIELD,

Petitioner,

v.

CITY OF MIAMI BEACH, a municipal corporation, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GORDON D. ROGERS
MULLER, MINTZ, KORNREICH, CALDWELL, CASEY, CROSLAND & BRAMNICK, P.A.
Suite 3600
First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2338
(305) 358-5500 (Dade)
(305) 522-0393 (Broward)

Attorneys for Respondents, City of Miami Beach, a municipal corporation, et al.

August, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTION PRESENTED

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING, PER CURIAM, THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO RESPONDENTS ON THE GROUNDS THAT PETITIONER'S COMPLAINTS ABOUT, INTER ALIA, "WASTE" BECAUSE SHE WAS REQUIRED TO PERFORM CLERICAL TASKS (SUCH AS PHOTOCOPYING) INVOLVED PERSONAL GRIEVANCES WHICH WERE NOT CONSTITUTIONALLY PROTECTED SPEECH AS A MATTER OF LAW.

LIST OF ALL PARTIES TO THE PROCEEDING

Counsel for Respondents certifies to the Court that the following persons are parties to or have an interest in the outcome of this case.

Ernie Barham, Respondent

Diane W. Camber, Respondent

G. Ware Cornell, Jr., Esquire
Counsel for Petitioner

Natalie Greenfield, Petitioner

Honorable Shelby Highsmith, Trial Judge
United States District Court for the Southern District of Florida, Miami Division

David V. Kornreich, Esquire
Former Counsel for Respondents

City of Miami Beach, Respondent[1]

Gordon D. Rogers, Esquire
Counsel of Record for Respondents

Carla Talarico, Respondent

---

[1] Pursuant to Supreme Court Rule 29.1, Respondent certifies that the City of Miami Beach, Florida, is a municipal corporation organized under the laws of the State of Florida which has no parent companies or subsidaries. The Bass Museum of Art is operated as a department of the City of Miami Beach.

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTION PRESENTED..... i

LIST OF ALL PARTIES TO THE PROCEEDING..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... iv

RESTATEMENT OF THE CASE..... 2

A. Petitioner's Employment..... 2

B. Petitioner's Speech..... 3

C. The Summary Judgment..... 6

REASONS WHY THE PETITION SHOULD BE DENIED..... 7

A. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition..... 7

B. The Lower Courts Did Not Depart From This Court's Precedents And Correctly Decided This Case..... 11

CONCLUSION..... 13

TABLE OF AUTHORITIES

Page

CASES:

Berry v. Bailey, 726 F.2d 670 (11th Cir. 1984), *reh'g denied* 746 F.2d 815 (11th Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985) 11

Caine v. Hardy, 943 F.2d 1406 (5th Cir. 1991) (en banc), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1474 (1992) 12

Connick v. Myers, 461 U.S. 138 (1983)...8, 10, 11, 12, 13

Greenfield v. City of Miami Beach, et al., 20 F.3d 1174 (11th Cir. 1994)..... 1

Greenfield v. City of Miami Beach, et al., 844 F. Supp. 1519 (S.D. Fla. 1992)..... 1

Pickering v. Board of Education, 391 U.S. 563 (1968) 11

Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984) 12

Terrell v. University of Texas Sys. Police, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) 12

Waters v. Churchill, ___ U.S. ___, 114 S. Ct. 1878 (1994) 9

CONSTITUTION OF THE UNITED STATES:

First Amendment 6, 8, 9, 13

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES STATUTES:

42 U.S.C. § 1983 6

42 U.S.C. §§ 2000e, et seq., Civil Rights Act of 1964 6

29 U.S.C. §§ 201, et seq., Fair Labor Standards Act 2

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Rule 15.1 2

Rule 29.1 ii

FLORIDA STATUTES:

Section 760.10 (1991) 6

No. 94-37

In The

Supreme Court of the United States

October Term, 1994

NATALIE GREENFIELD,

Petitioner,

v.

CITY OF MIAMI BEACH, a municipal corporation, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the City of Miami Beach, Diane W. Camber, Ernie Barham and Carla Talarico, respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the Eleventh Circuit's, per curiam, affirmance of the summary judgment entered by the District Court in this case. Contrary to Petitioner's representations, the District Court's Order is reported at 844 F. Supp. 1519 (S.D. Fla. 1992). The per curiam affirmance by the Eleventh Circuit Court of Appeals is reported at 20 F.3d 1174 (11th Cir. 1994).

RESTATEMENT OF THE CASE

Respondents adopt and incorporate by reference the undisputed material facts set forth in the orders entered by the District Court, as summarized below.[2]

A. Petitioner's Employment.

On May 14, 1990, the Petitioner became employed as a clerk/typist at the Bass Museum of Art (Bass Museum), which is operated by the City of Miami Beach. At the time she took the job, she advised her supervisors that she was a practicing Orthodox Jew. Respondent Diane Camber, who is also of the Jewish faith, was the Executive Director of the Bass Museum during Petitioner's employment.

Petitioner was a civil service employee whose position was non-exempt for purposes of the overtime pay requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. Petitioner's supervisors at the Bass Museum initially permitted her to work a "flexible"

---

[2] Supreme Court Rule 15.1 places an affirmative duty upon respondents to "address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." The District Court's well reasoned opinion accurately sets forth the facts of this case and applies the correct law. Accordingly, but for the above-referenced rule, no further public funds would have been expended upon this litigation. However, it is apparent from the misstatements of fact set forth in the petition that the Petitioner seeks to persuade this Court that this case is something which it clearly is not. The District Court showed remarkable restraint in addressing similar misstatements of fact in the proceedings below. *See, e.g.*, Appendix to Petition at pages 23A-24A.

schedule to permit her to attend to her religious obligations, medical appointments and other personal matters without loss of pay and without utilizing paid leave time. Petitioner ultimately abused those "flex time" privileges by self-adjusting her schedule without supervisory approval such that in some weeks she would work less than the required hours without loss of pay followed by weeks in which she professedly "made up the time" resulting in more than forty (40) hours and additional pay for overtime in those weeks. Petitioner's "flex time" privileges were subsequently curtailed based upon these abuses.

While employed at the Bass Museum, Petitioner was counselled numerous times about her performance problems and about the need to follow the instructions given to her by her supervisors. R-17-57, -58, -60, -61, -65, -88, -90; R1-33-Exh.D; R1-33-Exh.E; R1-33-Exh.F; R1-33-Exh.J.[3]

B. Petitioner's Speech.

Although the Bass Museum is publicly supported, it depends heavily upon donations from private benefactors. Susan Miller and Joyce Kaiser were members of the Friends of the Bass Museum as well as major contributors. During Petitioner's employment, Ms. Miller was the immediate past president of the Friends of the Bass

---

[3] References to the record below are designated by volume number, document number and page number or exhibit number in accordance with the practices observed by the Eleventh Circuit Court of Appeal.

Museum and Ms. Kaiser was the incoming president of that philanthropic organization. R1-10-11, -13.

During her employment at the Bass Museum, Petitioner made one or more telephone calls to Susan Miller in which she complained about the limitations on her job duties as a clerk and disputes she had with her supervisors regarding her job performance. In one such conversation, Petitioner read to Ms. Miller memoranda from Petitioner's supervisor concerning her performance deficiencies. Petitioner also complained to Ms. Miller that it was "wasteful" to limit her (Petitioner's) job duties to clerical functions and that the office in which she worked was inefficient because her supervisor required her to spend too much time making photocopies or inventorying supplies.

Petitioner specifically testified that her point in speaking to Ms. Miller was to persuade her that Petitioner's talents could be more efficiently utilized if she were permitted to generate members for the Friends of the Bass Museum instead of being relegated to clerical tasks. Petitioner also testified that she was not advising Ms. Miller of alleged corruption or other malfeasance at the Bass Museum. R1-17A-11, -13. By bringing her complaints to Ms. Miller's attention, Petitioner hoped to persuade Ms. Miller to intercede on her behalf to resolve Petitioner's dissatisfaction with her personal employment conditions. R1-17B-246, -247. Petitioner made no efforts to communicate her various complaints to the public at large.

Petitioner did not complain to Ms. Miller that she was the victim of anti-Semitism. Petitioner's only reference to alleged anti-Semitism when speaking to Ms. Miller was that the Petitioner had been told by someone

else that one of her supervisors had allegedly made an anti-Semitic statement at a meeting at which the Petitioner was not present. R1-17A-19, -20, -33, -34.

Bass Museum Executive Director Diane Camber became aware of Petitioner's activities when Ms. Miller called her to complain that Petitioner had been calling Ms. Miller constantly complaining about the limitations on her job duties and her supervisors. Ms. Miller's purpose in bringing the matter to Ms. Camber's attention was to have her instruct the Petitioner to stop bothering Ms. Miller with intra-office disputes. R1-18-Exh.F. Ms. Camber requested that Ms. Miller put her complaint against Petitioner in writing. That was done in a letter dated January 3, 1991. Petitioner received a three (3) day disciplinary suspension for this and other misconduct in March 1991. Petitioner appealed that disciplinary action to the City's Personnel (civil service) Board, which subsequently conducted a hearing and upheld the suspension.

On May 24, 1991, in spite of Ms. Camber's instructions, Petitioner made another complaint in person to Joyce Kaiser, who at the time was the incoming president of the Friends of the Bass Museum, while the two were at the front desk in the Development Office at the Bass Museum. In that discussion, Petitioner complained to Ms. Kaiser, who was then responsible for membership development, that she (Petitioner) had the ability to develop members but that her supervisors would not give her the opportunity. R1-18-Exh.E. Ms. Kaiser subsequently wrote a letter of complaint to Ms. Camber regarding the Petitioner's conduct. Petitioner was dismissed from City employment on June 28, 1991, based upon charges of conduct unbecoming an employee, attempting to use

political influence to alter her job duties and demonstrating antagonistic conduct toward her supervisors. Petitioner did not appeal her dismissal to the City's Personnel Board.

C. The Summary Judgment.

Petitioner claimed,[4] inter alia, before the District Court that by cancelling her "flex time" privileges, the City failed to reasonably accommodate her religious beliefs and violated her right to free exercise of religion. Petitioner additionally asserted under 42 U.S.C. § 1983 that the City violated her right to freedom of speech under the First Amendment by dismissing her from employment based in whole or in part upon her complaints to Ms. Miller and Ms. Kaiser concerning her working conditions at the Bass Museum.

Respondents moved for partial summary judgment on Petitioner's speech and religion claims on the grounds that she had been afforded reasonable accommodation and her complaints of alleged "wasteful practices" including "misallocation of physical and human resources," (Petition at page 2), were purely personal in nature. Petitioner sought to avoid summary judgment by pointing to her single remark to Ms. Miller about an

---

[4] Petitioner has apparently abandoned her First Amendment religious discrimination claim and her religious discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. and Section 760.10, Florida Statutes (1991). She seeks certiorari herein only with respect to her First Amendment speech claim under 42 U.S.C. § 1983.

alleged anti-Semitic remark which Petitioner did not personally hear and by showing that "she genuinely cared about departmental efficiency," (Petition at page 3).

After the District Court entered summary judgment against the Petitioner on her speech and religious accommodation claims, she sought rehearing. A copy of an "Anti-Defamation League Survey on Anti-Semitism and Prejudice in America" was submitted as an exhibit to Petitioner's motion. (Appendix to Petition at page 23A). From this, she argued that any conceivable mention of alleged anti-Semitism by a public employee is *per se* a matter of public concern sufficient to trigger constitutional protection irrespective of the content, form and context of the speech. She further contended that she was the victim of "direct religious discrimination." The District Court squarely addressed and rejected each of these arguments in denying rehearing. After hearing oral argument, the Eleventh Circuit Court of Appeals affirmed the District Court, per curiam.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition.

Granting the petition for certiorari in this case would be an exercise in sophistry. The Petitioner's statement of issues bears little, if any, resemblance to the issues actually decided by the District Court. It is not surprising that the Petition contains no specifics on the speech at issue in this case. Instead, by limiting her references to broad

generic complaints of alleged "wasteful practices," (Petition at page 2), the Petitioner seeks to paint herself as a "whistleblower" who was "genuinely concerned" with eliminating waste in government. The District Court correctly concluded based upon undisputed facts that Petitioner was, instead, blowing her own horn in a purely personal effort for personal advancement.

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court examined the First Amendment rights of public employees who speak not as citizens on matters of public concern but instead as employees airing personal grievances about their jobs. The Court squarely rejected the notion that everything which happens in a public agency is automatically a matter of public concern, stating: "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. Thus, in cases involving discipline or dismissal of government employees based upon speech, the Court first determines whether the speech at issue can be fairly characterized as involving a matter of public concern. If it cannot be fairly so characterized, it is unnecessary to examine the reasons for the employee's dismissal. *Connick*, 461 U.S. at 146. "Whether an employee's speech addresses a matter of public concern must be determined by [its] content, form, and context . . . as revealed by the whole record." *Connick*, 461 U.S. at 147-148. Moreover, "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7 (citations omitted).

More recently, in *Waters v. Churchill*, ___ U.S. ___, 114 S. Ct. 1878, 1887-88 (1994), this Court stated:

> Rather, the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.
>
> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.

As to Petitioner's first issue, the District Court did not rule and the Eleventh Circuit did not affirm the notion advanced by Petitioner that a public employee who protests alleged anti-Semitic conditions at work forfeits First Amendment protection merely because he or she is of the Jewish faith. Instead, the District Court correctly ruled as a matter of law that under the facts of

this case, the content, form and context of the Petitioner's isolated comment regarding anti-Semitism to Ms. Miller showed on the whole record that it did not warrant constitutional protection because it related only to her personal gripes and grievances concerning her job. There can be no doubt from the record in this case that Petitioner's motive in speaking was purely to further her own interests and not to bring alleged ethnic bias, misfeasance or malfeasance to the attention of the general public. Accordingly, notwithstanding that complaints of alleged anti-Semitism could be fairly characterized as a matter of public concern in some circumstances, the nature of the whole communication in this case "reflect[s] one employee's dissatisfaction with [her supervisors] and an attempt to turn that displeasure into a cause celebre." *Connick*, 461 U.S. at 148 (footnote omitted).

Petitioner's second proffered issue is similarly a hypothetical unsupported by the record or the decisions below. It is premised upon the erroneous supposition that the Petitioner somehow magically transformed her self-serving personal complaints of alleged "waste" at the Bass Museum into issues of public concern merely by asserting that she "genuinely cared" about efficiency in government.

The District Court correctly analyzed the content of Petitioner's complaints of governmental "waste," which were premised upon her view that it was wasteful to require a person of her talents to perform the menial clerical tasks for which she had been hired. The District Court also properly considered that such speech occurred in the context of the Petitioner's admitted personal motive of persuading a museum benefactor to intercede

and get her a better job soliciting members for the Bass Museum. The District Court then properly considered Petitioner's various communications as a whole and held that Petitioner spoke not as a citizen on matters of public concern but instead as a government employee on an intra-office dispute with her supervisors.

B. The Lower Courts Did Not Depart From This Court's Precedents And Correctly Decided This Case.

Petitioner argues that the lower courts departed from the rule established in *Connick* by failing to separately analyze her single anti-Semitism comment to Ms. Miller under the balancing test explained in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Petitioner assails the District Court's observation that alleged anti-Semitism could be a matter of public concern as inconsistent with its ultimate ruling that when the nature of her various communications were viewed as a whole, "Greenfield's speech was *primarily* aimed toward personal gain, not public concerns." (Appendix at page 23A). This argument is specious.

The record as a whole in this case reflects that the Petitioner was convinced and repeatedly expressed to Museum benefactors that she could do a better job than her supervisors running the Bass Museum "efficiently." *Cf. Berry v. Bailey*, 726 F.2d 670, 674 (11th Cir. 1984), *reh'g denied*, 746 F.2d 815 (11th Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985) (if sheriff's deputy were fired for insubordination, "even if his way of trying to run the Sheriff's Office were objectively more moral or efficient than the

way the Sheriff chose to run his office, he would have no First Amendment protection"). When Petitioner's supervisors rebuffed her aspirations for a better position and required her to perform the clerical tasks for which she had been hired, she saw fit to go over their heads and plead her case directly to the wealthy private benefactors upon whom the Bass Museum depends for operating funds. In so doing, Petitioner put her personal interests above those of her employer by pestering the private benefactors and attempting to drag them into petty intra-office disputes to the point where both benefactors complained and requested that the Petitioner be directed to stop bothering them.

Petitioner acted without regard for the potential consequence of withdrawal of the thoroughly annoyed private benefactors' financial support for the Bass Museum. The District Court thus properly viewed the totality of Petitioner's speech as *primarily* that of a disgruntled employee under *Connick* and ruled that her single reference to a hearsay comment involving alleged anti-Semitism could not transform her speech into a matter of public concern. *See Renfroe v. Kirkpatrick*, 722 F.2d 714 (11th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984); *Terrell v. University of Texas Sys. Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987); *Caine v. Hardy*, 943 F.2d 1406, 1416 (5th Cir. 1991) (en banc), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1474 (1992) (. . . "our task is to decide whether the speech at issue in a particular case was made *primarily* in the plaintiff's role as a citizen or primarily in his role as employee").

CONCLUSION

The District Court and the Eleventh Circuit Court of Appeals correctly applied *Connick* by analyzing the totality of Petitioner's speech including the context in which she spoke and the purely personal motive underlying such speech. Both courts properly concluded that her speech was not protected by the First Amendment because Petitioner spoke primarily as a disgruntled employee of the City and not as a citizen on matters which could be fairly characterized as being of public concern. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GORDON D. ROGERS
MULLER, MINTZ, KORNREICH,
CALDWELL, CASEY, CROSLAND &
BRAMNICK, P.A.
Suite 3600
First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2338
(305) 358-5500 (Dade)
(305) 522-0393 (Broward)

Attorneys for Respondents,
City of Miami Beach, a
municipal corporation, et al.